

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 06-81080-CIV-MIDDLEBROOKS/JOHNSON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

MERCER CAPITAL, INC., et al.,

Defendants.

/

OMNIBUS ORDER

THIS CAUSE is before the Court on the following motions: (1) Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred (D.E. #162); (2) Claimant Piedmont's Motion to Accept Late Filed Claim, incorrectly styled "Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred" (D.E. #163); (3) Receiver's Motion for Enlargement of Time to Make Second Distribution to Approved Claimants (D.E. #164); and, (4) Claimant Fauder's Motion to Accept Late Filed Claim, incorrectly styled "Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred" (D.E. #165).

The above-captioned matter was referred to this Court by the Honorable Donald M. Middlebrooks, United States District Judge for the Southern District of Florida, after the parties consented to trial before the undersigned United States Magistrate Judge. In view of said consent, the above-stated motion shall be disposed of by order rather than by report and recommendation.

I BACKGROUND

Presently, this is a receivership action in which Daniel S. Newman, Esq., has been appointed Receiver for the Mercer Entities who were Defendants in the underlying action. Pursuant to Orders entered by the Honorable Donald M. Middlebrooks on November 21, and November 22, 2006, Daniel S. Newman, Esq., as Receiver for the Mercer Entities, has been entrusted with the task of, among other things, recover and take control of the Mercer Entities' assets for the benefit of its defrauded investors.

In accordance therewith, on June 19, 2008, after the parties consented to jurisdiction before the undersigned United States Magistrate Judge, the Receiver filed an Unopposed Motion for Authorization to Transmit Proofs of Claim and Establish Claims Bar Date (D.E. #127). This Motion was granted on June 23, 2008 (D.E. #129) providing the Receiver with authorization to transmit proofs of claim and establish a claims bar date.

In accordance with the Court's Order, the Receiver mailed Proof of Claim forms to all known investors and creditors of the Mercer and Tri-State Receivership entities and posted a copy of the Proof of Claim form on the Receiver's website so that investors and creditors could download a copy and submit it to the Receiver's office. The Receiver also publicized notice of the pendency of the Receivership proceedings, including the claims process, for two days over a two-week period in *USA Today*, a national newspaper publication. In this regard, the Receiver specifically requested and obtained permission to serve notice by publication as aforesaid. See Order on Receiver's Motion, (D.E. #129, p.4). By granting the Receiver's Motion the undersigned also found, at the Receiver's request, that notice by publication constituted sufficient notice to discharge the Receiver

and the Receivership entities from their obligations, if any, to investors and creditors who may have had knowledge of the pendency of the Receivership Proceeding. *Id.*

Pursuant to the Court's Order, all Proofs of Claim were to be completed and returned to the Receiver's office no later than September 29, 2008 (the "Claims Bar Date"). Notably, the Claims Bar Date was prominently featured on the first page of each Proof of Claim form, as well as in the letter from the Receiver that accompanied each form that was mailed to the investors and creditors. Thereafter, on June 30, 2010, the Court entered an Order granting the Receiver's Motion to Approve Second Distribution to Approved Claimants (D.E. #161). Following the Order referred to immediately above allowing for a second distribution to approved creditors, the four motions which are the subject of the within Omnibus Order followed.

II. MOTIONS AT ISSUE

The background as it relates to these motions is as follows. Since the filing of the Receiver's Motion to Approve Second Distribution to Approved Claimants, three investors who failed to file timely Proof of Claims have contacted the Receiver requesting they be permitted to participate in the approved distribution process.¹ These three investors are Vincent Albenese, Barbara Piedmont and Nadira Fauder *Id.* Two of these investors, Barbara Piedmont and Nadira Fauder, have filed the motions referred to above, incorrectly styled "Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred" (D.E. #s 163 & 165, respectively). It is the Receiver's position that these three investors, none of whom filed a Proof of Claim form by the September 29, 2008 Claims Bar Date or at any

¹ See Receiver's Motion to Approve Second Distribution to Approved Claimants (D.E. #161, p.2).

time thereafter, should not be permitted to participate in the Court-approved distribution process. To effectuate this request, the Receiver has filed its Motion to Deem all Claims Not Filed by Claims Bar Date Barred (D.E. #162). The Receiver has also filed a Motion for Enlargement of Time to Make Second Distribution to Approved Claimants (D.E. #164), which requests an extension of time to make distribution only if the Court should permit the late failed claims.

III. DISCUSSION

Claims bar dates are routinely used in receiverships and bankruptcies and are necessary to provide finality and enable the Receiver to identify the interests of the claimants. See *In re PT-1 Commc'n, Inc.*, 403 B. R. 250, 259 (E.D.N.Y. 2009) (noting that claims bar date allows parties to identify claimants and amounts of claims in bankruptcy action); *In re Hooker Inv., Inc.*, 937 F. 2d 833, 840 (2d Cir. 1991) (“[E]stablishing the identities and interests of the participants so that claims-allowance process may begin is an essential function served by a bar order.”). Without a claims bar date, the Receiver could never identify the universe of claimants with any certainty and, consequently, could not calculate the amounts owed to investors. Indeed, a pro rata plan of the type approved by this Court in the instant case required the implementation of a bar date since a pro rata share could not be determined until the final number of investors and creditors was identified.

In the instant case, each of these late-filed investors denies ever having received a copy of the Proof of Claim form, despite them having received prior mailed correspondence from the Receiver during the pendency of the Receivership. Further, their

claims are not minimally late, but late by nearly two years at a time when the pro rata distribution to investors has already been calculated. If the Court were to permit the filing of the late-filed claims, the Receiver would be required to re-calculate the pro rata distribution to investors to account for the additional investor claims in the finite pool of funds. These tasks would further prolong the distributions due and owing to those investors who filed timely claims. As such, were the sought-after permission granted, the Court would in effect be rewarding those investors who failed to file their claims in a timely manner to the detriment of those conscientious investors who filed proper claims on timely basis. A result the Court does not agree with.

IV. CONCLUSION

Accordingly, the Court agrees with the Receiver that the subject investors, Vincent Albenese, Barbara Piedmont and Nadira Fauder, should not be permitted to file claims nearly two years after the September 29, 2008 Claims Bar Date, as requested, resulting in the denial of the motions filed by Barbara Piedmont (D.E. #163) and Nadira Fauder (D.E. #65). This ruling by removing any impediment to proceeding with the distributions as scheduled, warrants the granting of the Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred (D.E. #162). Consequently, the Receiver's Motion for Enlargement of Time to Make Second Distribution to Approved Claimants (D.E. #164) is rendered moot, and on this basis will be denied. In accordance with the above and foregoing, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

(1) Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred (D.E. #162) is **GRANTED**;

(2) Claimant Piedmont's Motion to Accept Late Filed Claim, incorrectly styled "Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred" (D.E. #163) is **DENIED**;

(3) Receiver's Motion for Enlargement of Time to Make Second Distribution to Approved Claimants (D.E. #164) is **DENIED AS MOOT**; and

(4) Claimant Fauder's Motion to Accept Late Filed Claim, incorrectly styled "Receiver's Motion to Deem all Claims Not Filed by Claims Bar Date Barred" (D.E. #165) is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 1st day of September, 2010.



LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Kenneth A. Marra
All Counsel of Record